

Protest of)	
)	Date: February 7, 1992
LYNDEN TRANSPORT, INC.)	
)	
Solicitation No. 980-72-91)	P.S. Protest No. 91-85

DECISION

Lynden Transport, Inc. (Lynden), timely^{1/} protests award of Highway Contract Route (HCR) No. 99502 for the surface transportation of mail between Anchorage General Mail Facility (Anchorage GMF), AK and Ketchikan, AK. Lynden, the second-low bidder, challenges the contracting officer's affirmative determination that the awardee, Cedar Bay Trading Co. (Cedar Bay), is a responsible bidder.

The solicitation, requiring twice weekly service between Anchorage, Haines, Juneau, and Ketchikan in Southeast Alaska, utilizing ferry boat service, was issued by the Seattle Transportation Management Service Center (TMSC) on July 3, 1991, with bid opening on August 15. The solicitation requested bids on a per pound basis with no minimum volumes guaranteed. Only two bids were received--Cedar Bay at \$0.1814 per pound and Lynden at \$0.2048 per pound. On November 5, the TMSC awarded Contract No. 99502 to the low bidder, Cedar Bay, with a starting date of January 11, 1992.^{1/} Lynden had previously provided the service awarded to Cedar Bay.

In its protest, Lynden argues that the contracting officer performed a superficial review of Cedar Bay's responsibility, allegedly consisting of a review only of its financial statement and management plan. Lynden argues that a more comprehensive review was necessary because Cedar Bay had no prior experience in the delivery of mail in Alaska and no demonstrated capability to perform timely delivery service.

^{1/}Because Lynden became aware of the basis for its protest on November 25, 1991, Lynden's November 27 protest is timely. Procurement Manual (PM) { 4.5.4 d.

^{2/}By letter, dated December 18, Lynden requested this office to defer the start of contract performance until resolution of its protest. As we explained to Lynden previously, the decision to suspend contractor performance following a protest after award lies with the contracting officer and is not within the purview of this office. See PM 4.5.5 b.

In his statement, the contracting officer points out that he performed precisely the sort of analysis of Cedar Bay's experience and capability that Lynden suggested. The contracting officer's report documents inquiries into Cedar Bay's experience and operating plans, including letters questioning specific cost items on Cedar Bay's worksheet and requesting detailed information concerning Cedar Bay's operating plans, equipment to be used and its management experience. The contracting officer reports that the answers he received from Cedar Bay convinced him that Cedar Bay could successfully perform service. The contracting officer spent so much time examining Cedar Bay's responsibility (almost three months) that the originally intended starting date for service, October 19, passed. The contracting officer awarded the contract on November 5, establishing January 11 as the date for service to begin.

Lynden submits comments concerning the contracting officer's report which challenged Cedar Bay's operating capability. Specifically, Lynden argues that Cedar Bay's shifting of its costs for fuel, ferry costs, labor and other items on the several versions of realigned cost worksheets it submitted demonstrated its lack of understanding of the contract requirements. Lynden also argues that Cedar Bay did not provide for the extra cost of using No. 1 diesel fuel during the colder months from October through April. Lynden states that Cedar Bay's plan to use 10-foot trailers, rather than standard 26-foot trailers, would not result in lower ferry tariffs because the ferry transports will charge Cedar Bay the 26-foot commercial vehicle rate. Lynden also criticizes the 10-foot trailers as difficult to control during movement and unstable during loading. In addition, Lynden states that Cedar Bay's equipment is too small to accommodate peak mail volumes and Cedar Bay has failed to provide for adequate back-up equipment.

Lynden also challenges Cedar Bay's experience and financial capability. Lynden argues that Cedar Bay's partners are practicing attorneys with no experience in transporting mail. With regard to its financial ability, Lynden points out that Cedar Bay has little cash and short-term assets to sustain daily operations.

Finally, Lynden argues that the contracting officer improperly extended the scheduled time for beginning service on this contract from October 19, to January 11. Lynden asserts that the contracting officer in this case unfairly used a lengthy period (August 15 to November 5) to investigate Cedar Bay's responsibility, permitting Cedar Bay to submit additional information and to realign its cost worksheet several times. Lynden asserts that this would not have been necessary if a more experienced and prepared carrier had been selected. Lynden also asserts that the contracting officer further erred in allowing Cedar Bay sixty-six days between the award and the commencement of service (November 5 to January 11) specifically to allow Cedar Bay time to obtain its custom trailers. Lynden views the solicitation as requiring service to start no more than ten days after contract award, and that allowing another bidder a longer time prejudiced Lynden, which was ready to commence service on ten days' notice.

In its comments, the awardee, Cedar Bay, responds to each of Lynden's contentions. It points out that because it was new to the mail delivery business, the contracting officer conducted an extensive review of its capabilities, which Cedar Bay passed. Moreover, because of its innovative use of custom 10-foot trailers, it was able to offer service at lower rates.

With regard to Lynden's specific contentions, Cedar Bay argues that it fully

understands the contract requirements and the equipment and personnel needed to fulfill the contract. It contends that further inquiry concerning mail volume peaks led to the use of larger equipment than originally contemplated and the corresponding realignments of its costs. Cedar Bay points out that its failure to account for the use of No. 1 diesel fuel during the colder months is not significant because the extra cost only amounts to \$680 a year compared to expected annual operating costs of \$413,542.

Cedar Bay argues that the equipment it plans to use is adequate. Cedar Bay asserts that it had discussed ferry rates for its 10-foot trailers with the ferry authorities and they had approved 10-foot vehicle rates for its trailers. Cedar Bay also increased the size of its large vans from 22 to 28-foot trailers to ensure sufficient volume for peak times and has obtained access to additional equipment on an as-needed basis to provide back-up and additional capacity.

With regard to Lynden's allegation that Cedar Bay lacked experience, Cedar Bay points out that its management has experience transporting perishable commodities. Cedar Bay also argues that the fact that it has already purchased the necessary equipment demonstrates its financial ability to perform.

Finally, Cedar Bay argues that the delay in the start of service under this contract was necessary to complete the contracting officer's comprehensive review of Cedar Bay's responsibility. Cedar Bay views this delay as proper because, contrary to Lynden's contention, the solicitation did not require service to commence ten days following award, but only promised that the Postal Service would grant an awardee at least ten days' notice prior to requiring service.

In rebuttal,^{1/} the contracting officer points out that fuel rates are routinely adjusted during the term of the contract and therefore adjustments for higher winter fuel rates will be made. He also states that Cedar Bay "provided satisfactory documentation for ferry rates". In addition, he states that Cedar Bay proposed adequate amounts of equipment to move the mail, its partners showed applicable experience in transportation and that Cedar Bay has sufficient assets to raise adequate funds to procure equipment and meet operating needs. With regard to his establishment of the January 11 date for service to begin, the contracting officer explains that when his examination of Cedar Bay's responsibility took longer than anticipated, he chose a January 11^{1/} start-up date to avoid disrupting existing emergency service and beginning the new service during the high volume period prior to Christmas. The contracting officer states that his decision to extend the start-up date to January 11 "had nothing to do with Cedar Bay's request for additional time to obtain the specialized equipment" and he asserts that he had previously advised Cedar Bay that they would not be given special consideration concerning the start-up date.^{1/}

^{3/} Although the contracting officer filed his rebuttal beyond the five-day period provided for in PM 4.5.7 h., we have decided to consider his untimely comments because they clarify matters of concern to this office. See PM 4.5.7 i.

^{4/} January 11 was the start of the first postal accounting period after the Christmas season.

^{5/} In August, when the October 19 start date was still contemplated, Cedar Bay had advised the contracting officer of its need for forty days' lead time to acquire equipment. In a September 27 letter, the contracting officer did not commit to providing such notice, noting only the TMSC's policy of giving as

Discussion

The primary issue in this protest is whether the contracting officer's affirmative determination of responsibility should be overturned.

It is well settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990; Georgia Power Company, P.S. Protest No. 90-01, February 14, 1990. Definitive responsibility criteria are not at issue here, no fraudulent behavior on the part of the contracting officer is alleged, and we find no abuse of the contracting officer's discretion.

Rather than conducting a cursory review of the responsibility of the awardee, Cedar Bay, as initially alleged by Lynden, the contracting officer conducted a comprehensive review involving substantial exchanges of correspondence and persistent inquiries concerning Cedar Bay's operating plans and other matters. That inquiry yielded evidence from which the contracting officer could conclude that Cedar Bay possesses sufficient equipment, experience and financial resources to perform the service.

Lynden also contends that the contracting officer unreasonably delayed performance of the contract to allow Cedar Bay sufficient time to obtain its custom-built 10-foot trailers.

Lynden's position is based upon an incorrect reading of the solicitation. The solicitation does not establish a maximum notice period prior to contract performance.

The solicitation states:

11. Term of the Contract:

A Contract will be awarded for a term beginning on 19-OCT-91, or a subsequent date as ordered by the contracting officer and ending on 30-JUN-95. The contract will be awarded not less than ten (10) days prior to the term beginning date as stated above.

Solicitation No. 980-72-91, Clause 11, Term of Contract (emphasis added). The solicitation clause grants the contracting officer the discretion to establish a date subsequent to October 19 as the starting date of contract service so long as the contractor receives ten days' notice of that date. The January 11 starting date provided

much notice as possible, depending on the time necessary to complete the determination of responsibility.

more than ten days' notice. The contracting officer's decision to permit approximately sixty-six days between award and the start of performance is a business decision within his discretion and will not be overturned except for clear abuse. See Georgia Power Company, supra. Nothing in the record indicates that the contracting officer abused his discretion. Obviously, the contracting officer spent a longer time investigating Cedar Bay's responsibility than had initially been planned when the solicitation was prepared. Since Cedar Bay was a new carrier in the Southeast Alaska area this extra time was not unreasonable. The contract requires service by multiple pieces of equipment and logistical coordination of multiple agents. The decision to avoid commencing this new, complex service in the high volume period prior to Christmas similarly was not unreasonable.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/18/95 WJJ]